92-126

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

BBCA, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Appellate Court had jurisdiction to adjudicate the substantive issues raised after determinating it had jurisdiction, the parties submitted briefs, had oral argument, and then determined it lacked jurisdiction based in part on pleadings of non-attorneys which the district court necessitated by continuing the litigation without the Petitioner having legal counsel because they were allowed to resign without replacement counsel?

Whether the Appellate Court had jurisdiction relating to Petitioner's timely appeal from a timely filed Rule 59(e) motion brought by the Respondent or whether it lacked jurisdiction because the Respondent's motion was only a Rule 60(a) motion?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner BBCA, Inc. respectfully prays that a writ of certiorari issue to review (or remand to the appellate court) the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on March 18, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 954 F.2d 1429 (8th Cir. 1992) and is reprinted in (App. A, p. 1a). The prior opinion of the United States District Court for the District of Minnesota, also reprinted in the appendix, is unreported and can be found at App. D, p. 15a. The United States Court of Appeals, denying rehearing and rejecting the suggestion of rehearing en banc (App. B, p. 11a) is unreported.

JURISDICTION

The opinion of the Court of Appeals was entered January 24, 1992. Petitioners' petition for rehearing was denied on March 18, 1992. The court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1340, 1346(a)(1) and 2410(a). Jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §§ 1291, 1291(a).

PROVISIONS INVOLVED

Federal Rules of Appellate Procedure:

Rule 4(a)(4)

Federal Rules of Civil Procedure:

Rule 5(b)

Rule 6

Rule 59(e)

Rule 60

STATEMENT OF THE CASE

The Petitioner BBCA, Inc. is a church, which had tax liens filed against it relating to 26 U.S.C. § 6700 penalties asserted against James Noske and Joan Noske. The Noskes have not yet had a trial regarding these penalties and their Section 6700 refund actions have been pending since 1986. Although Noskes have never transferred any assets to BBCA, Inc., the I.R.S. liened all of property and confiscated its funds, which it was prohibited from doing under 26 U.S.C. § 6703(c) while Noskes' 26 U.S.C. § 6700 refund actions were pending. BBCA, Inc. brought a quiet tiled action attempting to have the liens removed.

The IRS defended, claiming it could attach the assets of the Church under its version of the reverse alter ego theory. The IRS's harassment of the Church's members seriously affected the ability to maintain membership or receive donations. A conflict over the Church's first amendment rights developed and, writs of mandamus were requested; and eventually the action was dismissed because the Church declined to divulge its membership. The district court's order and judgment, dated November 26, 1990, stated the "Defendant's motion to dismiss for

failure to cooperate in discovery is GRANTED." The order did not specify whether the dismissal was with or without prejudice.

The IRS brought a motion pursuant to "Rules 59(e) and 60(a) of the Federal Rules of Civil Procedure to alter or amend the judgment entered by the clerk," requesting "that the judgment entered on November 26, 1990 be vacated and a judgment dismissing the complaint with prejudice be entered." The Notice also stated "when entering the judgment, however, the clerk (presumably inadvertently) stated that the dismissal was without prejudice. See App. C, p. 12a.

The IRS timely served its "UNITED STATES' MOTION TO AMEND JUDGMENT," under Rule 5(b) of the Fed. R. Civ. P. on December 10, 1990 by mail. See App C, p. 14a. Its service on December 10th was within the 10 days allowed under Rule 59. December 1 and 2 were not counted within the 10 day period nor were December 8 and 9 because they were intermediate Saturdays and Sundays under Rule 6.

On December 18, 1990, the district court granted the I.R.S.'s motion and directed the clerk to vacate the November 26 judgment and enter a judgment noting that the dismissal was with prejudice. See App. D, p. 15a.

On December 26, 1990, BBCA, Inc. filed a notice of motion to reconsider the dismissal

with prejudice. The notice stated that a memorandum in support of the motion would be forthcoming. BBCA, Inc's counsel had previously been allowed to resign from the case without appointment of successor counsel, the district court proceeded without the Church having counsel. When no memorandum was received, the district court denied the motion on February 1, 1991.

On February 14, 1991, BBCA, Inc. filed a notice of appeal from the district court's dismissal with the Eighth Circuit Court of Appeals. App. E, p 16a. It appealed from the District Court's Order of Dismissal with Prejudice issued and entered on the 18th day of December, 1990. App. D, p 15a.

BBCA, Inc. also appealed (App. E, p 16a) from the District Court Order entered on February 1, 1991 rejecting BBCA, Inc.'s December 26, 1990 "Motion for Reconsideration."

On April 22, 1991 the Eighth Circuit Court of Appeals sent a letter stating this "Court determined that [BBCA, Inc's] appeal is timely and not premature." (App. G, p 23a) On December 12, 1991 a three judge panel heard oral argument which primarily addressed whether the District Court had abused its discretion in dismissing BBCA, Inc.'s quiet

title action with prejudice and rendered its opinion on 1-24-92. (App. A, p. 1a)

The government's counterclaim in the action was based on a claim that under Minnesota Law the assets of a corporation may be taken to satisfy the [alleged] liabilities of one or more individuals under an alter ego theory.

ISSUES RAISED BY BBCA, Inc. IN ITS APPEAL TO THE EIGHTH CIRCUIT

BBCA, Inc. argued that where a "counterclaim was not properly maintainable against the [Plaintiff], the District Court abused its discretion in dismissing the suit as a discovery sanction." E.E.O.C. v. First Nat. Bank of Jackson, 614 F.2d 1004 (5th Cir. 1980). In the BBCA, Inc. action, all discovery disputes, including dismissal with prejudice, were the result of the government's assertion of its alleged claim of alter ego. The outcome of the BBCA, Inc. case was not dependent upon how discovery ended up or what facts were ultimately found.

BBCA, Inc., also raised the issue that Minnesota Law simply does not allow the assets of a corporation to be taken to satisfy the alleged liability of an individual under the alter ego theory. That because

the government could not prevail on its counterclaim of alter ego, BBCA, Inc's dismissal without prejudice must be reversed. It asserted the Court could not be said to be applying the law fairly in upholding a dismissal with prejudice when the I.R.S. did not have any possible right to relief under its alter ego theory in the first place.

The Eighth Circuit Court of Appeals panel completely circumvented any substantive arguments stating:

> On February 14, 1991, BBCA filed a notice of appeal from the district court's dismissal with prejudice. The IRS argues that the notice of appeal was untimely. Because we agree, we do not reach the merits of BBCA's claim.

App. A, p. 4a Order

The Appellate Court stated "[b]ecause we find that neither the IRS's "motion to amend" nor BBCA's motion to reconsider" were timely filed Rule 59 motions, November 26 was the appropriate date from which to calculate the time for filing a notice of appeal. App. A, p. 4a, Order.

PETITION FOR REHEARING EN BANC

Thinking that it was possible that the Court of Appeals simply miscounted its days BBCA, Inc. brought a Petition for rehearing en banc in early February, 1992. BBCA, Inc. delineated accurately on pages 11 through 14

of its petition why the I.R.S.'s Motion for reconsideration was timely served under rule 59(e) and Rule 6 Fed. R. Civ. P. App. F, pp. 18a - 22a.

The Appellate Court requested the I.R.S. respond to BBCA, Inc's Petition. While the I.R.S. was no longer contesting its Motion to Reconsider was within the requisite 10 days, it argued it was not really a Rule 59(e) motion. The Appellate Court denied BBCA, Inc.'s Petition for Rehearing in Banc. App. B, p. 11a.

It is the terrific waste of judicial resources, the lack of predictability in ascertaining what will be deemed a Rule 59(e) motion or a Rule 60 motion that existed in this case and exists among the Circuits that is the focus of this Petition for Writ of Certiorari. A pronouncement by this Court is needed.

REASONS FOR GRANTING THE PETITION

This petition should be granted because it addresses an issue which continues to squander the scarce resources of the judicial system and causes great ambiguity in determining when a notice of appeal is to be filed. The conflict evolves around whether a Rule 59(e) motion to alter or amend a judgment has been filed or whether it is a Rule 60(a) motion.

When it is a Rule 59(e) motion any notice of appeal filed before the motion is ruled on is deemed premature. The bringing of a Rule 59(e) motion tolls the time during which a notice of appeal need be filed under Rule 4(a)(4) of the Fed. R. App. P. On the other hand, if deemed a Rule 60(a) Motion (relief from clerical error) the period in which to file a notice of appeal is not tolled.

The federal circuit appeals courts continue to look at this problem in two basically different ways. If the motion is filed within 10 days of the entry of the judgment, it is deemed by some circuits to be a Rule 59(e) motion. Other circuits look at whether the relief requested is that of a substantive format and tend to disregard the actual wording of the motion as in the present action.

The most rational rule would be a firm 10 day rule which provides that a motion filed within 10 days of the judgment entered shall be deemed a Rule 59(e) motion for purposes of perfecting an appeal, especially when filed by an opposing party and the motion on its face makes reference to Rule 59(e).

THE EIGHTH CIRCUIT'S APPROACH

In the present action there is no dispute "the IRS's motion did state that it was pursuant to "Rule 59(e)." App. A, p. 6a (Eight Circuit Order) There is also no dispute that the IRS's motion pursuant to Rule 59(e) sought "to alter or amend the judgment entered by the clerk," and the IRS requested "that the judgment entered on November 26, 1990 be vacated and a judgment dismissing the complaint with prejudice be entered." App. C, p 12a.

The Eighth Circuit circumvented the plain wording of the Motion by decreeing "the substance of a motion rather than the form of a motion is controlling." App. A, p 6a. It cited as an example Miller v. Transamerican Press, Inc., 709 F.2d 524, 527 (9th Cir. 1983) (though styled as a Rule 59(e) motion "nomenclature is not controlling").

Transamerica's "styled its motion a Rule 59(e) motion." Id. at p 527 The Ninth Circuit allowed it to be deemed as invoking relief under Rule 60(a), noting "[u]like a Rule 59(e) motion, a Rule 60 motion does not affect the validity of a previously filed notice of appeal. See Fed. R. App. P. 4(a)(4); Fed. R. Civ. P. 60." Id. at p 527.

The Ninth Circuit applied its "substantive change" rule in Miller in order that the appellant could obtain judicial review; not to deprive him of it, holding "[i]t did not destroy the pending notices of appeal or our jurisdiction." Id. at p 528.

The Eighth Circuit determined that the I.R.S. motion to alter or amend as described in the first paragaraph did not seek a substantive change, citing for example St. Paul Fire & Marine Ins. v. Continental Casualty, Co., 684 F.2d 691, 693 (10th Cir. 1982). App. A, p. 6a Order.

The Court in Continental noted three requirements must be met in order for a Rule 59 motion to toll the time for appeal under Rule 4(a)(4); noting "[f]irst, the document filed must be a motion. Second, the motion must be timely. And third, the motion must be one of the four types of motions specified in the rule." Id. at p 692. In addressing

what a motion is, the Court noted in addressing what has been filed that "[t]echnically, therefore, it is not a motion," stating "we do not base our decision on this technical error in the form of motions." Id. a p 692. Continental states in citing County of Imperial v. United States, 348 F.2d 904, 905 (9th Cir. 1965) at p 693:

> Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered, should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew.

The Eighth Circuit basically claims it was self evident that the dismissal was with prejudice under Fed. R. Civ. P. 41(b), making reference to the fact the motion mentioned "inadvertent" error. This of course does not taken into consideration:

1. A dismissal for discovery violations under Rule 37 (as in the present case) may be with or without prejudice;

2. The order was not obviously explicit or the IRS would not have sought to have it amended to read with prejudice; and

3. The District Court would not have vacated its November 26 judgment and have it rendered with prejudice if it was of no consequence.

An amendment of the judgment will be denied if it would serve no useful purpose. Crane Co. v. American Standard, Inc., 88 F.R.D. 199, 208 (D.C.N.Y. 1980)

The Eighth Circuit compared LeBeau v. Taco Bell, Inc., 892 F.2d 605, 607 (8th Cir. 1989) (dismissed for failure to prosecute) in support of its determination that "[b]ecause the December 18 judgment merely made explicit what was implicit in the November 26 judgment, the IRS's motion did not seek a substantive change. Id. at 609." App. A, p. 8a Order. In Taco Bell "[n]o appeal was filed from the dismissal or the denial of the motion to vacate." Id. at 607.

It is ironic that part of the reason that Rule 59(e) was amended in 1948 was in part because of the Eighth Circuit's decision in an action which addressed dismissal without prejudice that was changed to "with prejudice."

The case was Boaz v. Mutual Life Insurance Company of New York, 146 F.2d 321 (8th Cir. 1944). The suit was dismissed at the close of plaintiff's evidence under Rule 41(b), but the dismissal was without prejudice.

On motion of the defendant made two days

thereafter, the district court set aside the dismissal without prejudice and entered a judgment of dismissal with prejudice. The Eight Circuit held that the court had power to do this, but Rule 59(e), expressly authorizing a motion to alter or amend the judgment, was added in 1948 to codify this power of the court. See The Advisory Committee Note to the 1948 amendment to Rule 59(e) which states in part:

> This subdivision has been added to care for a situation such as that arising in Boaz . . . and makes clear that the district court possesses the power asserted in that case to alter or amend a judgment after its entry.

The Eighth Circuit seems to have reversed its self citing Rule 41(b) stating "[u]nder this rule, the original dismissal was without prejudice even though it did not expressly so state." App. A, p. 7a.

The United States Supreme Court has acknowledged the rationale for Rule 59(e), citing Boaz and noting the Advisory Committee Report in White v. Hampshire Dept. of Employment Sec., 455 U.S. 454 (1982). However the problem of what constitutes a Rule 59(e) motion versus a Rule 60(a) Motion continues undefined by this Court and it is treated differently by the Circuits.

HOW OTHER CIRCUITS HAVE ADDRESSED THE PROBLEM

The Fifth Circuit has taken the 10 day approach:

> Whether this court treats the motion under Rule 59(e) or Rule (60) depends on the time at which the motion is served. If the motion is served within ten days of the rendition of the judgment, the motion falls under Rule 59 (e); if it is served after that time, it falls under Rule 60(b).

Teal v. Eagle Fleet, Inc., 933 F.2d 341, 347 (5th Cir. 1991)

The Tenth Circuit has also taken the 10 day approach:

> Generally, regardless of how it is styled or construed by the trial court, a motion filed within ten days of entry of judgment that questions the correctness of judgment is properly treated as a motion to alter or amend judgment.

Vreeken v. Davis, 718 F.2d 343 (10th Cir. 1983); also see Skagerberg v. State of Okl., 797 F.2d 881 (10th Cir. 1986)

The Seventh Circuit has taken the substance approach:

> Substance controls in determining whether postjudgment motion is a motion to alter or amend the judgment or a motion for relief from judgment.

Bank of California, N.A. v. Arthur Anderson & Co., 709 F.2d 1174 (7th Cir. 1983)

The Eleventh Circuit seems to have taken a combined approach:

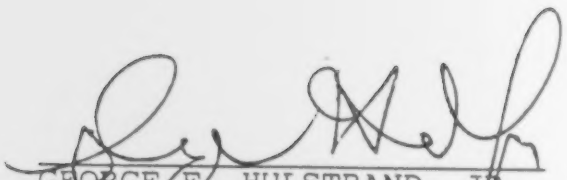
> A defendant's motion which raised the propriety of a district court's insistence on joint and several liability, clearly a substantive issue going to the heart of the judgment, and was filed within ten days of judgment, was a Rule 59(e) motion, rather than a Rule 60 motion, and thus tolled the time for filing appeals, notwithstanding the fact that the only rule specified in the motion's caption was Rule 60.

Finch v. City of Vernon, 845 F.2d 256 (11th Cir. 1988)

CONCLUSION

The conflicting approaches taken by the circuits interpreting whether the Motion is a Rule 59(e) or Rule 60(a) Motion continues to waste scarce judicial resources. It totally confuses parties regarding proper times in which to file notices of appeal and as in the present case unfairly denies access to appellate review based on hyper technicalities. This Court should accept this petition for writ of certiorari in order to decree the applicable uniform standards to be applied in deeming whether a motion is a Rule 59(e) motion. From a judicial resource point of view and a public policy point of view of providing predictable access to the appellate Courts it makes absolutely no sense to leave this issue in its present state of confusion.

Dated: June 12, 1992.



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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-1538MN

BBCA, Inc.,

Appellant,

John B. Ellering;

James L. Noske;

Intervenor Below

Joan M. Noske

Intervenor Below

v.

United States of America,

Appellee.

OPINION

Appeal from the United States District Court for the District of Minnesota.

Submitted: December 12, 1991

Decided: January 24, 1992

Before JOHN R. GIBSON, MAGILL, and BEAM, Circuit Judges.

MAGILL, Circuit Judge.

BBCA, Inc., (BBCA) appeals the district court's dismissal with prejudice of its quiet title action. BBCA argues that the district court abused its discretion by dismissing this action for abuse of discovery. Because BBCA failed to file a notice of appeal within sixty days of the district court's dismissal, as required by Federal Rule of Appellate Procedure 4(a)(1), this court lacks jurisdiction to review the dismissal.

I.

The IRS filed tax liens on the real property of BBCA (a "church") for unpaid federal tax assessments made against Joan and James Noske. BBCA, seeking to have the liens lifted, brought an action to quiet title pursuant to 28 U.S.C. § 2410 (1988). The IRS defended, claiming that the liens were valid because BBCA was the alter ego of Joan and James Noske (Noskes). BBCA claimed that the IRS's alter ego theory was not a valid defense under Minnesota law. The district court rejected this argument and allowed the IRS to proceed with discovery on this theory of defense. To establish that BBCA was the alter ego of the Noskes, the IRS sought to discover information related to the functioning of BBCA. BBCA continually refused to comply with these discovery

requests for a variety of reasons, none of which the district court found meritorious. Accordingly, the court entered orders compelling discovery, required BBCA to pay the IRS's attorney's fees as sanctions for violating these orders, and finally granted the IRS's motion to dismiss.

The IRS's motion to dismiss requested the court to "penalize plaintiff's intransigence by dismissing its Complaint with prejudice." The court's order and judgment, dated November 26, 1990, stated that "Defendant's motion to dismiss for failure to cooperate in discovery is GRANTED." The IRS subsequently brought a "motion to amend judgment" stating that the dismissal of the complaint was with prejudice, but "the clerk (presumably inadvertently) stated that the dismissal was without prejudice."1 Supp. App. at 72. On December 18, 1990, the court granted this motion and directed the clerk to vacate the November 26 judgment and enter a judgment

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1 Contrary to the IRS's statement in its motion to amend, the November 26 judgment does not state that it is "without prejudice" but follows the wording of the court's order stating that "defendant's motion to dismiss for failure to cooperate in discovery is granted."

noting that the dismissal was with prejudice. On December 26, 1990, BBCA filed a notice of motion to reconsider the dismissal with prejudice. The notice stated that a memorandum in support of the motion would be forthcoming. When no supporting memorandum was received, the district court denied the motion on February 1, 1991. No further motions were filed.

On February 14, 1991, BBCA filed a notice of appeal from the district court's dismissal with prejudice. The IRS argues that this notice of appeal was untimely. Because we agree, we do not reach the merits of BBCA's claim.

II.

The timely filing of a notice of appeal is a prerequisite to this court's appellate jurisdiction.2 See, e.g., Spinar v. South Dakota Board of Regents, 796 F.2d 1060, 1062

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2 Although the IRS did not bring a motion to dismiss the appeal within fifteen days of the docketing of the appeal, see 8th Cir. R. 47A(b), this court has a duty to examine its jurisdiction, and can do so on its own motion. See 8th Cir. R. 47A(a); see also Faysound Ltd. v. Falcon Jet Corp., 940 F.2d 339, 341 n.2 (8th Cir. 1991) (per curiam).

(8th Cir. 1986). The Federal Rules of Appellate Procedure require parties to file a notice of appeal within sixty days after the date of entry of the judgment or order from which they seek to appeal.3 Fed. R. App. P. 4(a)(1). The IRS argues that this calculation should be from the date of the original order dismissing the complaint, November 26, 1990. If this date is used, the February 14 notice of appeal was filed beyond the sixty-day period. BBCA, on the other hand, argues that the sixty-day period runs either from December 18, 1990, when the court changed the previous judgment to read with prejudice, or from February 1, 1991, when the court denied BBCA's motion to reconsider. If either of these dates are used, the notice of appeal was timely.

BBCA relies on Federal Rule of Appellate Procedure 4(a)(4) to support its argument that the calculation should be from either December 18 or February 1. This rule provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party:. . . (iii) under Rule 59 to alter or amend the judgment. . . the time for appeal for all parties shall run from the entry of the order . . . granting or denying [the] motion.

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3 The time is thirty days when the United States is not a party.

Fed. R. App. P. 4(a)(4) (emphasis added). Because we find that neither the IRS's "motion to amend" nor BBCA's "motion to reconsider" were timely-filed Rule 59 motions, November 26 was the appropriate date from which to calculate the time for filing a notice of appeal.

A. IRS's Motion to Amend

BBCA argues that the IRS's motion to amend was a Rule 59(e) motion because it expressly stated that it was made "pursuant to Rules 59(e) and 60(a)," and because the new judgment resulted in a substantive change. The IRS argues that its motion to amend was a Rule 60(a) motion to correct a clerical mistake, not a Rule 59(e) motion. Rule 60(a) motions do not extend the time for filing a notice of appeal. We find that the IRS's motion was a Rule 60(a) motion.

Although the IRS's motion did state that it was pursuant to "Rule 59(e)," the substance of a motion rather than the form of a motion is controlling. E.g., Miller v. Transamerican Press, Inc., 709 F.2d 524, 527 (9th Cir. 1983) (though styled as a Rule 59(e) motion "nomenclature is not controlling"). To be a Rule 59(e) motion, the IRS must have sought a substantive change in the judgment. See, e.g., St. Paul Fire &

Marine Ins. v. Continental Casualty Co., 684 F.2d 691, 693 (10th Cir. 1982). We find that it did not.

The IRS's motion clearly sought only the correction of a clerical error. The motion itself focused on the clerk's "inadvertent" error when entering judgment, and the district court expressly noted that the new judgment was entered because of clerical error. Additionally, adding the language "with prejudice" did not change the effect of the November 26 judgment. Federal Rule of Civil Procedure 41(b) provides:

> Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b). Under this rule, the original dismissal was with prejudice even though it did not expressly so state.4

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4 Arguably, even without Rule 41(b), it was clear that the court intended its dismissal to be with prejudice. The IRS's motion for dismissal clearly requested that the plaintiff's complaint be dismissed with prejudice and the court's order clearly stated the IRS's motion to dismiss was

Cf. LeBeau V. Taco Bell, Inc., 892 F.2d 506, 607 (7th Cir. 1989) (under 41(b), court's order that "cause dismissed for want of prosecution" was with prejudice). Because the December 18 judgment merely made explicit what was implicit in the November 26 judgment, the IRS's motion did not seek a substantive change. Id. at 609. Accordingly, it was not a Rule 59(e) motion, but a Rule 60(a) motion that did not extend the time for filing a notice of appeal. See United States v. Mansion House Center North Redevelopment, 855 F.2d 524, 527 (8th Cir.) (per curiam), cert. denied, 488 U.S. 993 (1988).

B. BBCA's Motion to Reconsider

Alternatively, BBCA argues that the sixty-day period should run from February 1, 1991, when the court denied its motion to reconsider. BBCA's motion to reconsider, however, clearly was not a Rule 59 motion. First, a Rule 59 motion must be brought within ten days after entry of the judgment the

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granted. Additionally, it is reasonable to assume that a dismissal for abuse of discovery would be with prejudice. Bobal v. Rensselaer Polytechnic Inst., 916 F.2d 759, 766 (2d Cir. 1990), cert. denied, 111 S. Ct. 1404 (1991).

moving party seeks to have changed. Fed. R. Civ. P. 59(b). BBCA did not file its motion to reconsider until December 26, more than ten days after the November 26 judgment. Second, all motions must state with particularity the grounds for relief sought. Fed. R. Civ. P. 7(b)(1); see also, e.g., Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 674 F.2d 1252, 1259-60 (9th Cir. 1982). BBCA's motion to reconsider did not address the merits of the motion--BBCA claimed that it would file a supporting memorandum, but never did.5 For both these reasons, BBCA's motion to reconsider was not a Rule 59 motion and did not alter the time for filing a notice of appeal.

III.

Because neither the IRS's motion to amend nor BBCA's motion to reconsider were Rule 59 motions, BBCA had sixty days from November 26, 1990, to file a notice of appeal in order to appeal the district court's order dismissing its complaint. BBCA failed to file a notice within this time. Accordingly, this

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5 Because we conclude that BBCA's motion to reconsider was incomplete, we will not review the district court's denial of this motion.

court has no jurisdiction to address the merits of the district court's dismissal of the complaint with prejudice.6

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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6 The notice of appeal was filed within sixty days of the court's December 18 order requiring the clerk to vacate the November 26 judgment and enter a new judgment reading "with prejudice." The issue of whether the district court abused its discretion in making this order, L.Z. v. Parrish, 733 F.2d 585, 588 (8th Cir. 1984), however, does not present a true controversy. Even if we were to vacate this order, BBCA would be no better off than if we affirmed--the dismissal would still be with prejudice. See LeBeau, 892 F.2d at 608.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 91-1538MNST

BBCA, Inc.,

Appellant,

v.

United States of America,

Appellee.

ORDER

Appeal from the United States District Court for the District of Minnesota.

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

March 18, 1992

Order Entered at the Direction of the Court:

Michael E. Gans (Signature)

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

BBCA, Inc., Plaintiff, v. United States of America, Defendant.	No. 3-89-CIV-319

UNITED STATES' MOTION TO AMEND JUDGMENT

The defendant, the United States of America, moves the Court pursuant to Rules 59(e) and 60(a) of the Federal Rules of Civil Procedure to alter or amend the judgment entered by the clerk on November 26, 1990. Pursuant to Rules 37(b) and 41(b) of the Federal Rules of Civil Procedure, the dismissal of the complaint on account of the plaintiff's failure to cooperate in discovery operated as a dismissal with prejudice. When entering the judgment, however, the clerk (presumably inadvertently) stated that the dismissal was without prejudice.

Accordingly, the defendant requests that the judgment entered on November 26, 1990 be vacated and a judgment dismissing the complaint with prejudice be entered.

JEROME G. ARNOLD
United States Attorney
Noreene C. Stehlik (sig)

NOREENE C. STEHLIK
Trial Attorney
Office of Special Litigation
Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489
(FTS) 368-6489

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

BBCA, Inc., Plaintiff, v. United States of America, Defendant.	No. 3-89-CIV-319

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing MOTION has been made this 10th day of December, 1990, by mailing a true and correct copy thereof to:

BBCA, Inc.
P.O. Box 98
Richmond, Minnesota 56368

Noreene C. Stehlik (sig)

NOREENE C. STEHLIK
Trial Attorney
Office of Special Litigation
Tax Division
U.S. Department of Justice
P.O. Box 7238
Washington, D.C. 20044
Telephone: (202) 514-6489
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APPENDIX D

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

BBCA, Inc.

JUDGMENT IN A CIVIL CASE

V.

United States of America

CASE NUMBER: 3-89 Civil 319

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That defendant's motion to dismiss for failure to cooperate in discovery is GRANTED WITH PREJUDICE

December 18, 1990
Date

FRANCIS E. DOSAL
Clerk

Denise LaFond (sig)
(By) Deputy Clerk

APPENDIX E

NOTICE OF APPEAL TO A COURT OF APPEALS FROM A JUDGMENT OR ORDER OF DISTRICT COURT

United States District Court for the Eighth Circuit
District of Minnesota
File Number: 3-89 Civil 319

BBCA, INC. Plaintiff, V. United States of America Defendant.	NOTICE OF APPEAL

Notice is hereby given that BBCA, Inc., plaintiff above named, hereby appeals; to the United States Court of Appeals, for the Eight Circuit from the Order of Dismissal with Prejudice issued by honorable Judge Edward J. Devitt entered in this action on the 18th day of December, 1990.

Another Order from the Honorable Edward J. Devitt was entered on February 1st, 1991 rejecting a "motion for reconsideration" without this counsel having submitted a memorandum. it is believed that this Order

is not a final appealable order; however in the event that it is deemed so, notice of appeal is taken from the February 1st, 1991 Order.

George Hulstrand (sig)

George Hulstrand, Jr.
Registration #
P.O. Box 549
Willmar, MN 56201
(612) 235-5333

FILED 2-14-91

FRANCIS E. DOSAL, CLERK

JUDGMENT ENTERED _____

DEPUTY CLERK'S INITIALS pk

APPENDIX F

THIS COURT HAS JURISDICTION -- THE PANEL FAILED TO CONSIDER RULE 6(a) OF THE FED. R. CIV. PROCEDURE IN DETERMINING THE I.R.S.'s MOTION UNDER RULE 59(e) WAS UNTIMELY and FAILED TO CONSIDER THE FACT THAT BBCA, INC. WAS WITHOUT LEGAL COUNSEL WHEN IT TILED IT'S "MOTION TO RECONSIDER."

After BBCA, Inc. perfected its appeal in this matter, it was informed by this court that this "Court has determined that this appeal is timely and not premature." (Exh 5) Oral argument was held on December 12, 1991. The panel issued a 7 page decision which stated in part:

> Because we find that neither the IRS's "motion to amend" nor BBCA's "motion to reconsider" were timely-filed Rule 59 motions, November 26 was the appropriate date from which to calculate the time for filing a notice of appeal.

Exh 6, p 4.

The decision also states:

> BBCA, . . . argues that the sixty-day period runs either from December 18, 1990, when the court changed the previous judgment to read with prejudice, or from February 1, 1991, when the court denied BBCA's motion to reconsider. If either of these dates are used, the notice of appeal was timely. (underlining added)

BBCA relies on Federal Rule of Appellate Procedure 4(a)(4) to support its argument that the calculation should be from either December 18 or February 1. The rule provides:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: ...(iii) under Rule 59 to alter or amend the judgment ... the time for appeal for all parties shall run from the entry of the order ... granting or denying (the) motion.

Exh 6 pp·3-4.

A. The I.R.S.'s Motion for Reconsideration was timely served under rule 59(e) and Rule 6 Fed. R. Civ. P.

Please note the panel never addresses Rule 6; its failure to do so was an oversight that resulted in an erroneous decision. Rule 59(e) requires "a motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." rule 6(b) which addresses enlargement of time makes no exception for Rule 59(b), (d) and (e) motions. Rule 6(a) provides "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computations." Rule 6 also provides "[i]n computing any period . . . the day of the act, event . . . from which the designated period of time begins to run shall not be included.

The District Court issued its Order of

dismissal without prejudice and Judgment was entered on 11/26/91. (Exh 9)
The "UNITED STATES MOTION TO AMEND JUDGMENT," has a CERTIFICATE OF SERVICE attached to it (Exh 8) which verifies service was made on December 10, 1990 by mail. Rule 5(b) Fed. R. Civ. P.

The District Court's JUDGMENT WAS ENTERED ON NOVEMBER 26, 1990. The I.R.S.'s SERVICE ON DECEMBER 10, 1990 WAS TIMELY UNDER RULE 59.

The JUDGMENT WAS ENTERED ON NOVEMBER 26, 1990 -- time is computed under the Fed. R. Civ. P. as follows:

Date:		Day:
November 27, 1990 --	Tuesday	1
28	Wednesday	2
29	Thursday	3
30	Friday	4
December 1, 1990	Saturday not counted under Rule 6(a)	
2	Sunday not counted under Rule 6(a)	
3	Monday	5
4	Tuesday	6
5	Wednesday	7
6	Thursday	8
7	Friday	9
8	Saturday not counted under Rule 6(a)	
9	Sunday not counted under Rule 6(a)	
10	Monday (I.R.S. service)	10

DECEMBER 10, 1990 WAS THE 10TH DAY AFTER ENTRY OF THE DISTRICT COURT NOVEMBER 26TH, 1990 JUDGMENT -- THE I.R.S. SERVICE ON THAT DATE WAS TIMELY -- This Court's panel determination that service was untimely is clearly

erroneous because they did not consider Rule 6, which should have been taken into consideration.

> Whether this court treats the motion under Rule 59(e) or Rule 60(b) depends on the time at which the motion is served. If the motion is served within 10 days of the rendition of the judgment, the motion falls under Rule 59(e); if it is served after that time, it falls under Rule 60(b)." (underlining added & citations omitted)

Teal v. Eagle Fleet, Inc., 933 F.2d 341, 347 (5th Cir. 1991)

The I.R.S.'s motion was captioned a "UNITED STATES' MOTION TO AMEND JUDGMENT," and stated the "United States of America, moves the Court pursuant to Rules 59(e) and 60(a) of the Federal Rules of Civil Procedure to alter or amend the judgment entered by the Clerk on November 26, 1990." (Exh 8) Judge Devitt acknowledged the I.R.S. had brought a motion to amend in his December 18, 1990 order stating "DEFENDANT UNITED STATES MOVES TO AMEND THE JUDGMENT." (Exh 2) The panel cites Honorable Judge Devitt's February 1, 1991 Order (footnote 1) which makes reference to a clerical error as support for its determination that the motion was solely a Rule 60 motion. This is despite the fact that the I.R.S.'s motion was captioned "united States Motion to Amend Judgment," and stated that it was brought under Rule 59(e). (Exh 8) Additionally the I.R.S.'s Motion to Amend

under Rule 59(e), was referred to by the District Court in its 12/18/90 Order as a "motion to amend the judgment" which it adjudicated. Footnote 1, was only written one month later in an order adjudicating BBCA, Inc's motion for reconsideration, District Court's 2/1/91 Order. See respectively Exh's 2 and 3.

It is the District Court's dicta in footnote 1; in an Order which addressed BBCA, Inc.'s motion for Reconsider[ation] which the panel relies on in its determination that the I.R.S.'s motion was solely a Rule 60 motion in addition to its claim of untimeliness. (Exh 3, Feb 1, 1991). Based on these constuctions the panel held that this Court did not have jurisdiction.

The policy implication for this Court are disastrous for this Court. If the panels decision is let to stand, the only way a litigant can hope to perfect an appeal when a multiple rule motion is brought is to determine if any of the rules plead may not extend the time for appeal if relief is granted on that rule. The panel is saying if one brings a motion under Rule 59(e) and Rule 60(a) you had better appeal immediately because if the District Court grants relief under Rule 60(a) instead of Rule 59(e) any appeal taken from the decision will be untimely!

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis Missouri 63101

Michael E. Gans
Acting Clerk

314-539-3600
FTS:262-3600

April 22, 1991

Mr. George E. Hulstrand, Jr.
Suite 1, Willmar Building
201 Fourth Street, S.W.
P.O. Box 549
Willmar, MN 56201

Re: No. 91-1538MN BBCA, Inc. vs. U.S.A.

Dear Mr. Hulstrand:

The Court has determined that this appeal is timely and not premature. The motion to vacate filed by BBCA on February 14, 1991 does not further toll the time period for filing a notice of appeal. Only those motions specified in FRAP 4(a)(4) toll the running of the time period for filing of a notice of appeal.

Accordingly, we have established a briefing schedule for this appeal and a copy is enclosed.

Sincerely,

Linda L. Penberthy (sig)
Linda L. Penberthy
Senior Deputy Clerk

LLOP/tab

Enclosure

cc: John B. Ellering
James L. Noske
Joan M. Noske
Norene C. Stehlik
Frank Dosal, Clerk (Dist. Ct. No. CIV-3-89-319)